Supreme Court, U.S.
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No. 92-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES HAMILTON, GERALD CRANK, ANTHONY RUSSELL and GERALD CARRELL,

Petitioners,

vs.

KOMATSU-DRESSER, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition should be denied for failure to name the proper party respondent.
2. Whether the Petition should be denied because it raises an issue not raised in the court of appeals.
3. Whether the Civil Rights Act of 1991 should be applied to this case.
4. Whether the Civil Rights Act of 1991, even if applied to this case, would mandate a different result.

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Civil Rights Act of 1991, S-1745 ..... *passim*

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RESPONDENT'S[1] BRIEF IN OPPOSITION

REASONS WHY THE CAUSE SHOULD NOT BE HEARD BY THIS COURT

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Supreme Court Rule 10. As appears below, there are no special and important reasons for granting certiorari in this case.

[1] Dresser Industries, Inc. has no parent corporation. It has no subsidiaries which are not wholly owned. Komatsu, Ltd. has no parent corporation nor does it have any subsidiaries which are not wholly owned.

Summary of Argument

The Petition should be dismissed because it names "Komatsu-Dresser, Inc." as respondent when no such entity exists. There were two defendants in the district court: Dresser Industries, Inc. and Komatsu Dresser Company, a joint venture. Both were granted summary judgment. The appeal to the Seventh Circuit involved only Dresser Industries, Inc. Dresser is not named herein as a respondent.

Even if the Court were to realign the parties, the Petition should be denied because the legal issue raised in the Petition was not presented to the Seventh Circuit. The issue (*i.e.* whether the Civil Rights Act of 1991 should be applied retroactively so as to revive the Petitioners' untimely charges of age discrimination) was raised for the first time in this litigation in the Petition.

Allowing the Petitioners to raise the issue would not yield a different result from that which issued in the Seventh Circuit. The Petitioners erroneously claim that the Seventh Circuit relied upon *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1991) in arriving at its decision when it is clear on the face of the opinion that it did not. The Civil Rights Act of 1991 amended Section 706(e) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(5)(e)(2) but did not purport to change the filing requirements under the Age Discrimination in Employment Act. Consequently, the Civil Rights Act of 1991 has no application here. Moreover, the alleged discriminatory acts of which the Petitioners complain did not arise out of the application of a seniority system which is a fundamental prerequisite to applying 42 U.S.C. §2000e-(5)(e)(2) as they seek to do in this case. Finally, even if the cited statutory provision were applied,

the result would be precisely the same as that reached by the Seventh Circuit. Consequently, the Petition should be denied.

I. The Petition should be dismissed for failure to name the proper party respondent.

The defendants in the trial court were Komatsu Dresser Company, a joint venture, and Dresser Industries, Inc. (A-19)[2] In granting the defendants' summary judgment motion, the trial court ruled that defendant Komatsu Dresser Company should be dismissed from the action with prejudice (A-19, fn. 1):

> The Complaint names two parties as Defendants. However, Dresser asserts that, as the litigation progressed through discovery, it became clear that the actions giving rise to the case were only those of the Defendant Dresser Industries, Inc. exclusively. Dresser contends that the joint venture known as Komatsu Dresser Company was not formed until after the actions giving rise to the Complaint. It appears that the Plaintiffs do not dispute this. Therefore, any claims against Defendant Komatsu Dresser Company, a joint venture, are dismissed with prejudice.

The plaintiffs appealed to the Seventh Circuit the grant of summary judgment in favor of Dresser Industries, Inc. They did not appeal the grant of summary judgment in favor of Komatsu-Dresser Company.

The Petitioners' brief, in its caption and in the "List of Parties", identifies Komatsu-Dresser, Inc. as the re-

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[2] The Respondent finds the Appendix submitted by the Petitioners adequate for the purpose of disposing of the issues raised by the petition. No separate or supplemental appendix will be filed by the Respondent.

spondent. Dresser Industries, Inc. is not identified as the respondent.

Clearly, Komatsu-Dresser Company should not be a party to any further litigation herein since the Petitioners failed to appeal the trial court's grant of summary judgment to it. Thus, the instant Petition should be dismissed.

Even if the Court were to consider Komatsu Dresser Company the respondent, or *sua sponte* substitute the parties, it is clear from the argument which follows that the Petition is meritless.

II. The Petitioners herein seek to raise an issue in this Court which they did not raise in the Seventh Circuit.

The issue which the Petitioners press this Court to accept for review is whether the Civil Rights Act of 1991 applies retroactively so as to revive their untimely charges of age discrimination. Even if the Court were inclined to accept this issue for review, this case is not the proper vehicle for considering it. The Petitioners failed to raise this issue for the Seventh Circuit's consideration and they cannot raise it for the first time in this Court.

The Petitioners gloss over this issue. Their brief states (p. 12):

> "In the present case, the Civil Rights Act of 1991 did not repeal the *Lorance* decision at the time the Petitioners and Respondent filed their briefs with the Seventh Circuit Court of Appeals."

The statement is true as far as it goes. What it fails to state, however, is that the Act became effective November 7, 1991 and the case was orally argued to the Seventh Circuit on December 12, 1991. (A-38) Moreover, the case

was not decided by the Seventh Circuit until May 12, 1992.[3]

The record is silent with respect to any effort of the Petitioners to raise the retroactivity argument in the Seventh Circuit between November 7, 1991 and May 12, 1992. The Petitioners made no effort to raise the issue at oral argument nor did they seek to supplement their brief to raise this issue in the Seventh Circuit following the Act's effective date.[4] No petition for rehearing was sought.

By failing to avail themselves of the opportunity to supplement their arguments or obtain rehearing, the Petitioners deprived the Seventh Circuit of the opportunity to consider this issue prior to positing it to this Court.

Absent extraordinary circumstances, none of which appear here, arguments not considered in the court of appeals should not be presented to the Supreme Court. *Tennessee*

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[3] In this regard, Petitions Appendix contains a crucial typographical error as it identifies the date of the decision as May 12, 1991.

[4] The rules clearly anticipate the filing of supplemental materials. Federal Rule of Appellate Procedure 28(j) states:

> "When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited."

Seventh Circuit Rule 28(i) provides:

> "Counsel shall file the original letter and ten copies of the supplemental authorities. The letter shall state in a single brief sentence the proposition the authority supports but shall contain no other authority or explanation."

v. Dunlap, 426 U.S. 312, 316, 96 S.Ct. 2099, 2101 (1976). Having had ample opportunity to raise the issue in the Seventh Circuit, the Petitioners should not be allowed to press this argument for the first time before this Court.

III. On the merits, this case does not warrant review by the Court.

The essence of the Petitioners' argument in support of review is that if the Civil Rights Act of 1991 were applied retroactively in this case their charges of discrimination might be considered timely. The difficulty with their analysis, however, is that the Act would have no impact upon the result in this case even if it were applicable.

The provision of the Act which the Petitioners seek to apply in this case is Section 112(2) which added the following provision to Section 706(e) of the Civil Rights Act of 1964:

> "For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system. (42 U.S.C. §2000e-(5)(e)(2))

The above-quoted provision is touted as having overturned the Court's decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989). The Petitioners contend that if the Seventh Circuit had applied the newly enacted legislation, rather than *Lorance*, to this case a different result would have attached. The problem with their argument is four fold. First, the amendment changed

the cited provision of the Civil Rights Act of 1964 but not the Age Discrimination in Employment Act under which this action was filed. Second, the Seventh Circuit did not apply *Lorance* in reaching its decision. Third, the alleged discriminatory acts of which the Petitioners complain do not arise out of the application of a seniority system. Fourth, to the extent their claims are seniority related, the dates on which the system was adopted, the Petitioners became subject to it, and were allegedly injured by it are one and the same, occurring more than 300 days prior to the filing of the charge.

A. The Civil Rights Act of 1991 did not amend the filing requirements of the Age Discrimination in Employment Act.

On its face, Section 706(e) of the Civil Rights Act of 1991 purports to amend only the filing requirements of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(5)(e)(2). It does not amend the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Thus, it has no application here. Petitioners' reliance on this provision is simply misplaced.

B. The Seventh Circuit's decision does not rely upon *Lorance*.

The linchpin of the Petitioners' argument is that the Seventh Circuit relied upon *Lorance* to reach the result reflected in its opinion. This is simply not the case.

Lorance is cited once in the Seventh Circuit's opinion (A-43):

> "The neutral application of a nondiscriminatory seniority system is not itself a discriminatory act. *See Lorance v. AT&T Technologies, Inc.* 490 U.S. 900, 904 (1989) and *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

The precedent for which *Lorance* was cited this single time had nothing to do with the timeliness issue. Rather, it was cited for a proposition that remains sound to date and which was unaffected by the passage of the Civil Rights Act of 1991. Thus, the Petitioner's contention that the Seventh Circuit applied *Lorance* in a manner inconsistent with the dictates of the Act is erroneous.

Furthermore, it is clear that the Seventh Circuit's opinion, affirming the district court's opinion in this case, draws its essence from *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980) and not *Lorance*:

> "The district court, applying *Ricks*, found that the discriminatory act was Dresser's refusal to train the plaintiffs in February, 1986." (A-42)
>
> * * *
>
> "This case is undistinguishable from the many cases that have found allegations of a discriminatory act leading, some time later, to termination of unemployment insufficient to establish a continuing violation. *See, e.g., Ricks* [citation omitted]" (A-44)

In short, this case does not turn on a *Lorance* analysis. It is purely dependent upon the correct application of *Ricks*.

The Civil Rights Act of 1991 nowhere purports to overrule *Ricks*. Thus, Petitioners' contention that the Civil Rights Act of 1991 merits a different result than that reached by the Seventh Circuit is misplaced. This case does not merit review.

C. The alleged discriminatory acts of which the Petitioners complain do not arise out of the application of a seniority system.

The particular changes wrought by the Act which the Petitioners attempt to press to their advantage apply only

"to a seniority system that has been adopted for an intentionally discriminatory purpose." 42 U.S.C. §2000e-(5)(e)(2). Prior to the filing of the instant Petition, this litigation did not concern itself with the adoption of an intentionally discriminatory seniority system. Rather, the focus of this litigation was the refusal of Dresser to permit the Petitioners to train for first class or 1-C jobs in February, 1986. This clearly is how the courts below viewed this litigation.

The district court framed the issue as follows:

> "Thus, the wrongful action complained of is not the Plaintiffs' actual termination, it is Dresser's failure to allow the Plaintiffs to train for a 1-C position." (A-26)

Moreover, the Seventh Circuit specifically noted that the Petitioners herein never sought to challenge the application of a seniority system:

> "The plaintiffs do not claim that the seniority system in the modified agreement was itself discriminatory; the plaintiffs were laid off and denied promotion under the facially neutral seniority system because they were 2-C employees, not because of their age." (A-43)

In short, the seniority system argument was never raised or considered below.

Even if it had been raised, it would have been rejected. This case is analytically distinct from *Lorance*. In this case, the Petitioners were refused retraining and, consequently, placed in a more precarious seniority system than someone granted the training. Thus, there was a simple, identifiable act which resulted in their being actively removed from one seniority system (1-C) and placed in a separate, less favorable one (2-C). The adverse consequence of which they complain was, in part, immediate

and, in part, delayed. By contrast, *Lorance* simply involved an adjustment in a single seniority system which unpredictably might have future adverse consequences. It lacked any immediate adverse consequence. The case presented by *Lorance* and the instant one are analytically distinct. Even if the seniority system issue had been raised below, it clearly would have been rejected for good cause.

D. Regardless of the analysis applied, the date which triggered the running of the period within which to file a charge was February, 1986.

Even if this case were analyzed under post Act standards, the same result would attach. This is because the key date is February, 1986, regardless of the chosen method of analysis, and no charge was timely filed in relation to that date.

Assuming *arguendo* that Petitioners had complained of an intentionally discriminatory seniority system, 42 U.S.C. §2000e-(5)(e)(2) would require the filing of a timely charge following the date "when the seniority system is adopted, when [the Petitioners] became subject to the seniority system, or when [the Petitioners are] injured by the application of the seniority system or provision of the system." The three events which would trigger the running of the time limit under the amended statute all occurred no later than February, 1986.

First, it is apparent the seniority system had been adopted prior to February, 1986. Second, it is equally apparent that the Petitioners had become subject to it by February, 1986. Third, they had been injured by its application on that date. The nature of their injury is that they were forced into 2-C status and denied training to become 1-C. With the assistance of their collective bar-

gaining representative, they filed grievances on February 7, 1986 challenging their placement and eventually lost at arbitration. (A-40 and A-30) Thus, they had by February 7, 1986 felt the sting of the application of the contract modifications which relegated them to 2-C status.[5] No charge was timely filed in relation to the February, 1986 decision.

Even applying the statutory change mandated by the Act, the result in this case would be the same. Review is not warranted.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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September 10, 1992

[5] Dresser admits that this final point is not a precise "fit". This is because, as argued earlier, this is not a seniority system case. The Petitioners were 2-C, not because of the application of any seniority system, but because Dresser refused to allow them to train to become 1-C.